MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1531

ALBERT JOHNSON, REV. EDDIE McBRIDE, JOHN FERGUSON, CHARLES CHIPLIN, ISSAC REMBERT, and JAMES ODELL DIXON,

Petitioners,

versus

STATE OF MISSISSIPPI, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 7

A. The Facts 7

B. Judicial Proceedings 15

ARGUMENT 19

Summary of Argument 19

I. Georgia v. Rachel, 384 U.S. 780 (1966), Allows Removal Under Any Federal Law Providing for Specific Civil Rights Stated in Terms of Racial Equality Which Forbids Harassing Prosecutions 19

II. Section 245(b) is a "Law Providing for ... Equal Civil Rights" Within the Meaning of the Civil Rights Removal Statute 24

III. Petitioners By These Arrests and Prosecutions are "Denied [and] Cannot Enforce" in State Court Their Rights Secured by 18 U.S.C. Section 245(b) 31

A. By Prohibiting Official Interference with Civil Rights Protest Activity, Section 245(b) Provides for a Right Not to be Arrested or Prosecuted for Protected Activity 31

TABLE OF CONTENTS (Continued)

Page

B. Removal is Necessary to Protect Section 245(b) Rights of Civil Rights Protest From Denial by State Criminal Process 36

IV. The Judgment Below Should be Reversed and the Case Remanded to the Court of Appeals 40

CONCLUSION 44

TABLE OF AUTHORITIES

Cases: Page

City of Greenwood v. *Peacock*, 384 U.S. 808 (1966) .....19,22-23 and *passim*

Cole v. *Ralph*, 252 U.S. 286 (1920) 43

Concerned Citizens of Vicksburg v. *Sills*, Civil No. 72W-18(N) (S.D. Miss. filed May 24, 1972) 16

Cox v. *Louisiana*, 379 U.S. 536 (1965) 43

Edwards v. *South Carolina*, 372 U.S. 229 (1963) 43

Georgia v. *Rachel*, 384 U.S. 780 (1966) .....19,21-22 and *passim*

Gibson v. *Mississippi*, 162 U.S. 565 (1896) 30

Hamm v. *City of Rock Hill*, 379 U.S. 306 (1964) ... 33,34

Kentucky v. *Powers*, 201 U.S. 1 (1906) 36

Keyes v. *School District No. 1*, 413 U.S. 189 (1973) 43

Mashburn v. *Daniel*, Civil No. 73J-138(R) (S.D. Miss. Aug. 20, 1973) 34

TABLE OF AUTHORITIES (Continued)

Cases: Page

NAACP v. *Thompson*, 357 F.2d 831 (5th Cir. 1966), cert. denied, 385 U.S. 820 (1967) 38

Neal v. *Delaware*, 103 U.S. 370 (1881) 30

North Carolina v. *Hawkins*, 365 F.2d 559 (4th Cir. 1966), cert. denied, 385 U.S. 949 (1966) 34

Perkins v. *Mississippi*, 455 F.2d 7, aff'd on rehearing en banc, 470 F.2d 1371 (5th Cir. 1972) 17,29,30,34

Strauder v. *West Virginia*, 100 U.S. 303 (1880) 36

Thompson v. *Brown*, 434 F.2d 1092 (5th Cir. 1970) 34

United States v. *Brims*, 272 U.S. 549 (1926) 43

Virginia v. *Rives*, 100 U.S. 313 (1880) 30,36

Walker v. *Georgia*, 417 F.2d 1 (5th Cir. 1969) 23,40

Whatley v. *City of Vidalia*, 399 F.2d 521 (5th Cir. 1968) 22,34

Statutes:

18 United States Code

§ 241 26
§ 242 26
§ 243 30
§ 245(b) ..... *passim*

TABLE OF AUTHORITIES (Continued)

Page

28 United States Code

§ 1254(1) 2
§ 1443(1) ..... *passim*
§ 1447(d) 2

42 United States Code

§ 1971 22
§ 1971(b) 22
§ 1973i(b) 22,34
§ 1973l(c)(1) 22
§ 1981 22,29
§ 1983 16
§ 2000a 21,25
§ 2000-2(c) 33,34

Georgia Code Annotated § 26-3005 (Supp. 1965) 21

Mississippi Code Annotated

§ 97-1-1 (1972) 6,8
§ 97-1-1(f) (1972) 11,33
§ 97-7-19 (1972) 11
§ 97-23-83 (1972) 8,11
§ 97-23-85 (1972) 8,11

Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27 29

Act of March 1, 1875, ch. 114, 18 Stat. (Pt. 3) 336 30

Legislative History

H.R. Rep. No. 473, 90th Cong., 1st Sess. (1967) .25-27,32

S. Rep. No. 721, 90th Cong., 1st Sess. (1967) ...25-27,32

TABLE OF AUTHORITIES (Continued)

Legislative History (Con't): Page

113 Cong. Rec. (1967) 28,32

114 Cong. Rec. (1968) 26,27,28

Other Authorities:

Rule 52(a), Federal Rules of Civil Procedure 11,43

A. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793 (1965) 36

Comment, *Civil Rights Removal Under 28 U.S.C. § 1443(1): One Hundred Years of Inutility*, 21 Am. U. L. Rev. 375 (1972) 34

Comment, *Removal of State Criminal Prosecutions To Federal Court Under 42 U.S.C. § 1443*, 64 J. Crim. Law 76 (1973) 34

Note, *Federal Jurisdiction: The Civil Rights Removal Statute Revisited*, 1967 Duke L. J. 136 30,34

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 488 F.2d 284, and is reproduced in Appendix B of the Petition (pp. 6a-13a). The order of the Court of Appeals denying petitioners' petition for rehearing and rehearing en banc and the dissenting opinion of Chief

Judge John R. Brown joined by four other judges is reported at 491 F.2d 94, and is reproduced in Appendix A of the Petition (pp. 1a-5a).

JURISDICTION

The Court of Appeals entered judgment on January 14, 1974 and denied rehearing en banc on March 15, 1974.[1] The petition for writ of certiorari was filed April 12, 1974 and was granted on October 21, 1974. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 1447(d).

QUESTION PRESENTED

Whether under *Georgia* v. *Rachel*, 384 U.S. 780 (1966), petitioners may remove the criminal prosecutions against them to Federal court pursuant to the civil rights removal statute, 28 U.S.C. § 1443(1), to protect their exercise of rights specifically protected from official interference by Title I of the Civil Rights Act of 1968, 18 U.S.C. § 245(b).

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1443(1) provides in relevant part:

§ 1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State Court may

1 By order of Circuit Judge Dyer entered April 1, 1974, the mandate of the Court of Appeals was stayed pending final disposition by this Court.

be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; . . .

* * *

2. 18 U.S.C. § 245(b)(§ 101(a) of the Civil Rights Act of April 11, 1968) provides in relevant part:

§ 245. Federally protected activities

* * *

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with —

(1) any person because he is or has been, or in order to intimidate such person or any other person or class of persons from —

* * *

(B) participating in or enjoying any benefit, service, privilege, program, facility,

or activity provided or administered by the United States;

* * *

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race [or] color, . . . and because he is or has been —

* * *

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

* * *

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides

lodging to transient guest, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

* * *

(4) Any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from —

(A) participating, without discrimination on account of race [or] color, . . . in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or (B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race [or] color . . . in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate — shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

* * *

3. Miss. Code Ann. § 97-1-1 (1972) (conspiracy) provides in relevant part:

If two (2) or more persons conspire either:

* * *

(f) To commit any act injurious to the public health, to public morals, trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws;

* * *

such persons, and each of them, shall be guilty of a felony and upon conviction shall be fined not less than five hundred dollars ($500.00) nor more than five thousand dollars ($5,000.00) or shall be

imprisoned not less than one (1) year nor more than five (5) years or both.

Provided, that where the crime conspired to be committed is a misdemeanor, then upon conviction said crime shall be punished as a misdemeanor as provided by law.

STATEMENT OF THE CASE

A. The Facts.

Through picketing, protest marches, demonstrations, a selective buying campaign, and mass meetings petitioners sought peacefully to eliminate racial discrimination in public and private employment, law enforcement, the administration of justice, and governmental services and to publicize the grievances of the Black citizens of Vicksburg, Mississippi. Petitioners, with other residents of the Black Vicksburg community, were thereupon arrested in May, 1972, while participating lawfully in such speech and peaceful assembly.

Prior to the picketing and demonstrations, the grievances and demands of the Black community were discussed with the city officials and merchants (App. 52, 54-55, 57, 68, 93-94).[2] When the grievances were not satisfied, petitioners helped organize and participated in (1) a primary economic boycott, or selective buying campaign, of the local white-owned businesses publicized by word-

2 The abbreviation "App." refers to pages of the printed Appendix, the abbreviation "Tr." refers to pages of the Trial Transcript of testimony taken at the remand hearing, and the abbreviation "R." refers to pages of the Record on appeal, which includes the pleadings.

of-mouth and picketing for the purpose of gaining equal treatment and equal employment opportunities in those businesses (R. 5, App. 22, 49, 53, 56, 58-59, 66-67, 69, 91), and (2) peaceful picketing, leafleting, protest marches, and mass meetings protesting and seeking an end to racial discrimination in employment and services in city and county government and governmental agencies (R. 5, App. 22, 31-32, 37-38, 49-50, 53, 56, 64, 66-67, 69, 91).

The picketing, leafleting, and selective buying campaign began in late March, 1972, and continued until early May. Groups of demonstrators and their leaders were arrested *en masse* on May 2, May 13, and May 14 (App. 3-17). A total of 49 demonstrators were forcibly arrested by armed Vicksburg police, jailed, and charged not with any threatening or violent conduct, but with the vague charge of conspiracy to commit "acts injurious to trade or commerce" pursuant to the Mississippi general conspiracy statute, Miss. Code Ann. § 97-1-1 (1972) (formerly Miss. Code Ann. § 2056(6) (1956 Recomp., Supp. 1972)).[3] After their arrests, petitioners initially were held in jail on excessive bail of $5,000 (R. 6, 27), which was equal to the

3 At the remand hearing in the District Court, the State asserted that all the demonstrators arrested on May 2, 13, and 14

> "are presently charged under Section 2056 of the Mississippi Code [now § 97-1-1] which is a general conspiracy statute containing a number of subparagraphs. The subparagraph used in this particular instance is where it is declared to be a crime to enter into a conspiracy harmful to trade or commerce." App. 30.

The arrest affidavits (App. 3-17) tracked the language of that statute. However, the trial court, and then on appeal the State, abandoned that claim; and contrary to the language of the arrest affidavits the trial court held, and the State represented to the Fifth Circuit, that the arrests were instead predicated on Miss. Code Ann. § 97-23-85 (1972) (secondary boycott) and § 97-23-83 (1972) (threats and coercion). The record in the trial court is devoid of any direct evidence that any of the petitioners committed any unlawful acts under these statutes. See pp. 10-13, *infra*.

maximum fine under the statute, forcing some to spend two days in jail while bail was being raised (App. 34, 64-65). Subsequently, bail was reduced categorically to $1,000 for those over 60 years of age and $1,500 for those under 60 years of age (R. 6, 27).

The testimony taken at the remand hearing shows that the arrests were made in bad faith without hope of ultimate success for the purpose of harassing petitioners in the peaceful exercise of their right to protest racial discrimination. Most of the demonstrators, including several of the petitioners, were arrested while picketing and carrying signs protesting racial discrimination (App. 56), and the remainder were arrested because of their participation in the civil rights protest activities.

For example, petitioner Rev. Charles Chiplin was arrested both on May 2 and on May 13 while walking with a picket sign and protesting racial discrimination in hiring and in the administration of justice (App. 90-91):

> "On May 2 I was walking up Washington Street with a picket sign, and an officer stopped me and said, 'You are under arrest.' " (App. 90)

Bennie Young was arrested with a group of about 30 other demonstrators on May 13 after he had carried a picket sign for about a block and a half from the assembly point protesting racial discrimination in city government employment and law enforcement (App. 31-33, 37-38). Petitioners Rembert and Dixon were arrested with a group of 17 demonstrators and protest leaders on May 2 (App. 4, 23), and petitioner Dixon was arrested again with a group of demonstrators on May 13 (App. 5, 23).

Petitioner Albert Johnson, who was arrested for his participation in the picketing on May 2 (App. 4, 23), and May 13 (App. 13, 24), was arrested again on May 21 for intimidating and coercing on the complaint of one James Sturgis (R. 34). Mr. Sturgis did not testify at the remand hearing; and Chief Brown, who was not present when the alleged incident occurred, could only testify that he had received a complaint from Mr. Sturgis (App. 109). Eddie Thomas, who testified as a witness for the petitioners, was present when the alleged incident took place and indicated that no threats or intimidation on Johnson's part had occurred (App. 70-73).

Petitioners Rev. Eddie McBride and John Ferguson, two of the leaders of the civil rights protest activity (App. 53, 57), were arrested directly after the May 2 picketing (App. 52), and petitioner McBride was arrested again on May 13 while picketing (App. 52) on four identical conspiracy charges (App. 11, 14-16), all because of their participation in the demonstrations (App. 126). While petitioner Ferguson was being booked he heard the Chief of Police state that "anybody on the street with a picket sign would be arrested" (App. 51).

The petitioners and their witnesses testified at the remand hearing that the demonstrators had been carefully and repeatedly instructed to picket peacefully and not to interfere unlawfully with any shoppers (App. 33-34, 53-54, 76, 86, 91, 100, 102), and that there was no violence, no threats or intimidation, and no forcible or threatening efforts by the demonstrators to keep customers out of stores (App. 33-34, 38, 53-56, 60-61, 67-68, 74-76, 88, 90-96, 102).

The arrest affidavits themselves (App. 3-17) all are boiler plate and fail to state any underlying facts to support the arrests. Chief Brown, the only witness for the State, executed the arrest affidavits which resulted in the arrests but did not personally observe the commission of any offense (App. 122, 125, 131, 134). No merchant or shopper testified that any of the demonstrators had interfered with trade or commerce.

At the remand hearing, the State contended only that the petitioners were arrested for conspiracy in restraint of trade (App. 30) under present Miss. Code Ann. § 97-1-1(f) (1972). However, District Judge Harold Cox himself *ex mero motu* changed the charges (App. 132-33) and invoked a series of amendments and enactments passed by the Mississippi Legislature in 1966 and 1968 in response to civil rights protest and boycott activity, including state statutes punishing secondary boycotts (Pet., App. D, p. 17a),[4] use of boycott to accomplish an unlawful purpose (Pet., App. D., pp. 17a-18a, n. 3),[5] and threats and coercion (Pet., App. D, p. 18a, n. 4).[6]

However, the findings of the trial court that petitioners were arrested for unprotected activity are clearly erroneous. Rule 52(a), F.R. Civ. P. The testimony is clear

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4 Miss. Code Ann. § 97-23-85 (1972), formerly Miss. Code Ann. § 2059.3 (1956 Recomp.) (Supp. 1972).

5 Miss. Code Ann. § 97-7-19 (1972), formerly Miss. Code Ann. § 2059.2 (1956 Recomp.) (Supp. 1972).

6 Miss. Code Ann. § 97-23-83 (1972), formerly Miss. Code Ann. § 2384.5 (1956 Recomp.) (Supp. 1972).

— and uncontradicted[7] — that the boycott activity against the merchants was not to create "an economic injury to these merchants with whom they actually had no quarrel" (Pet., App. D, p. 17a), but rather was a protest against their discriminatory employment practices, a goal specifically protected by § 245(b)(2)(C):

> "Q. Which white merchant did you have a particular complaint about, any specific complaint about?
>
> A. It wasn't specific, it was collectively. I felt that they all could aid in giving better and more jobs to black people.
>
> * * *
>
> The things that the black people of Vicksburg are asking for are in conjunction, basically in conjunction with both the city officials and the merchants; the activities of the merchants in not allowing more black people to work other than janitorial positions are uncalled for because there are sales people and managerial type people in Vicksburg who are qualified and able to do a good job. Basically, I think it's good business for businessmen to hire black people." App. 58, 66-67 (Ferguson testimony).

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7 The District Court apparently relied upon a March 23, 1972, letter from the "Black Concerned Citizens of Vicksburg" to the Vicksburg Chamber of Commerce for a statement of the protesters' demands (Pet., App. D, p. 16a). However, from the text of the letter (App. 135-36) it is clear that those demands were stated only as a condition precedent to future meetings, not as the goals of the protest activity, which were stated in the oral testimony.

Although Vicksburg Police Chief Marion R. Brown, at whose direction all the arrests were made, testified that there had been interference with and harassment of shoppers by unnamed and unknown persons, a close reading of his testimony reveals that his notion of interference consisted primarily of free speech activity informing shoppers of the boycott (App. 112-14).[8] He testified that he had received some complaints from Blacks of anonymous threatening telephone calls, but the unlawful activities of others cannot provide a basis for the suppression of protected free speech activity. Chief Brown had no information that any of the petitioners had engaged in any unlawful activities:

> "Q. My question would be this then, Chief Brown, do you have any information as to particularly the petitioners that are charged committing any of the [unlawful] acts, if in fact these acts occurred?
> A. No, I don't know." App. 124.

The sole and exclusive basis for these arrests was petitioners' civil rights protest activities:

> "BY THE COURT:
> Do you know what he [petitioner Ferguson] was arrested for and accused with?

8 When asked what the picketers were doing prior to their arrests, Police Chief Brown testified that they would

> "Stop people, just reach out and stop a person that would have a package in his hand. I heard Albert Johnson, I heard James Chiplin, and several others, Victor Parsons, tell people that they were not suppose [sic] to be downtown shopping that there was a boycott on." (App. 114).

BY THE WITNESS [Chief Brown]:
He was arrested, I believe, on May 2, with the first group that was arrested. He has actually participated in the boycott, and in fact, at the beginning he was very actively participating in it.

* * *

BY MR. WINFIELD:
Q. Do you not know of any intimidation that Mr. Ferguson —
A. The only thing I've seen him, I've seen him actually carry a picket sign, I've seen him stopping people on the street and talking to them.
Q. Was that unlawful?
A. No, there's nothing unlawful about stopping a person and talking." App. 126.

These arrests broke the back of the civil rights protest movement and ended the picketing (App. 96). When asked by the District Judge whether picketing was continuing, petitioner John Ferguson responded:

> "No, it isn't going on now for the simple reason that if anyone gets on the street with a picket sign they will be charged with criminal conspiracy, and the bail is astronomical." (App. 50)

While petitioners' appeal was pending, and after the picketing had been successfully halted, the charges against the original 49 petitioners were presented to the Warren County grand jury, and the grand jury returned

no true bills against 43 of the 49 arrested demonstrators (App. 140-41). All charges against the 43 protesters have been dropped (id.). However, the six leaders and principal activists of the protest movement (App. 36-37, 49, 90), who are the petitioners here, were indicted for conspiracy to restrain trade and commerce (App. 142-43).

B. Judicial Proceedings.

The 49 arrested demonstrators filed their verified petition for removal on May 25, 1972 (R. 1-25), and an amended petition on June 1, 1972 (App. 19-28), removing the criminal prosecutions against them from the City Court of Vicksburg and the County Court of Warren County to the United States District Court for the Southern District of Mississippi pursuant to the civil rights removal statute, 28 U.S.C. § 1443. The petitioners asked that the removal be sustained and the charges against them dismissed. In their petition, the demonstrators alleged that all their civil rights protest activity was conducted in a "lawful and peaceful manner" (App. 22) and "in the exercise of rights guaranteed to petitioners by Title I of the Civil Rights Act of 1968, 18 U.S.C. 245." (App. 25). They alleged that the charges against them "have no basis in fact" and were brought

> "solely and exclusively for the purpose and effect of depriving petitioners of their Federally protected rights, including by force or threat of force, punishing, injuring, intimidating, and interfering, or attempting to punish, injure, intimidate, and interfere . . . with petitioners, and the class of persons participating in the Warren County boycott and demonstrations, for the exer-

> cise of their rights peacefully to protest discrimination and to conduct and publicize a boycott which seeks to remedy the denial of equal civil rights . . . which activities are protected by 18 U.S.C. § 245." App. 25-26.

Petitioners alleged that as a result of the arrests and state criminal prosecutions they "are denied and cannot enforce their rights asserted under 18 U.S.C. 245" in the courts of the state "because that statute protects those who are arrested for exercising the rights . . . conferred by that statute, not only from conviction in state courts, but also from prosecution in those courts."[9] App. 26.

After an evidentiary hearing on the State's motion to remand the prosecutions, District Judge Harold Cox remanded the cases back to the state court on January 4, 1973 (Pet., Appendix D, pp. 15a-25a; App. 137) on the ground that petitioners "were not engaged at the time in the discharge, or performance of any federally protected right or activity. * * * This petition does not in any wise or to any extent involve the exercise by these petitioners of any federally protected right such as public accommodation, peaceful picket and the like [footnote omitted]." Pet., App. D, p. 19a. On appeal, the Fifth Circuit affirmed the District Court's remand order based solely on its interpretation of the removal statute. 488 F.2d 284 (5th Cir. 1974). The Court of Appeals held that petitioners had a

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9 Simultaneously, the petitioners also filed a complaint pursuant to 42 U.S.C. § 1983 seeking injunctive relief against the arrests and prosecutions in a companion action, *Concerned Citizens of Vicksburg v. Sills*, Civil No. 72W-18(N) (S.D. Miss. filed May 24, 1972), but the District Court denied temporary injunctive relief which would have held the prosecutions in status quo pending a final hearing on the merits (Order of May 26, 1972). A final hearing in that action has not yet been held, and is not part of this appeal.

right to engage in free speech and picketing activity, which was protected from official interference by 18 U.S.C. § 245(b), and that § 245 "clearly deals with equal civil rights" (488 F.2d at 286). But the Court of Appeals ruled that removal of criminal prosecutions was precluded as a matter of law here because § 245(b), as a criminal statute, is not a statute "providing" for the equal civil rights of citizens within the meaning of the civil rights removal statute, 28 U.S.C. § 1443(1). In essence, the Court of Appeals held that removal under § 1443(1) can be predicated only on Congressional enactments explicitly providing civil sanctions because a criminal statute, regardless of its express provisions and Congressional intent, has not "*created* a new legal right" and therefore cannot be a law which "*provides* for . . . equal civil rights" (488 F.2d at 287, emphasis in original).[10]

After the adverse panel decision, petitioners' petition for rehearing en banc was denied by a 10-5 vote of the full court. 491 F.2d 94 (5th Cir. 1974) (en banc). Chief Judge John R. Brown, joined by four other judges of the Fifth Circuit, dissented from the denial of the rehearing en banc on the grounds that the issue was "of recurring transcendent importance" and the panel's decision "is doubtful if not erroneous" (491 F.2d at 94). Adhering to his prior dissents in *Perkins* v. *Mississippi*, 455 F.2d 7, 11-61, on rehearing en banc, 470 F.2d 1371, 1371-73 (5th Cir. 1972), Chief Judge Brown maintained that the obvious

10 Because the Fifth Circuit determined that petitioners were not entitled to removal as a matter of law, review in this Court should proceed on the assumption that petitioners' activity falls entirely within 18 U.S.C. § 245(b). If this Court reverses the legal conclusion of the Fifth Circuit, then this Court may make an independent examination of the record to determine whether petitioners' activities come within the protections of § 245(b) or remand the case to the Court of Appeals for review of the factual contentions. See Argument IV, *infra*.

Congressional purpose behind 18 U.S.C. § 245 (preventing unwarranted interference with civil rights protest activity) and the broad scope of its prohibition (against attempted injury, intimidation or interference by force or threat of force) make it "a law *providing* for *equal* civil rights, satisfying the requirements of the civil rights removal statute" (491 F.2d at 94-95) (emphasis in original).

> "It is my opinion that the panel improperly concluded that § 245 is not a law providing for the equal civil rights of citizens within the meaning of the removal statute. The restrictive interpretation applied to § 245 refuses appellants their 'right' to peacefully protest racial discrimination free from the harassment of bad-faith prosecutions inspired by their activities.
>
> * * *
>
> "The foreboding result which excludes § 245 from the ambit of removal establishes a precedent which will prevent the federal courts from granting relief in future cases of spurious criminal prosecutions against persons protesting racial discrimination. Even worse, this ruling, if it is allowed to stand, leaves a large group of potential victims without effective personal redress for acts which run the gamut of crass, undisguised racial discrimination [footnote omitted]." (Id.)

ARGUMENT

Summary of Argument

The principles established in *Rachel* and *Peacock* control this Court's review of the legal question of statutory construction of whether Title I of the 1968 Civil Rights Act, 18 U.S.C. § 245(b), is a law which provides for equal civil rights stated in terms of racial equality *and* which protects petitioners even from state court prosecution for the exercise of rights secured by the statute. The Court of Appeals held that Section 245(b) could not qualify as such a law, within the meaning of the civil rights removal statute, 28 U.S.C. §1443(1), because as a criminal statute it was not a law which *provides* for equal civil rights. Such a distinction between civil and criminal statutes, however, is contrary to the intent of Congress and the prior decisions of this Court. And an analysis of the legislative intent and meaning of Section 245(b) shows that its protections, including from harassing state court prosecutions, are at least as broad as those provided by the civil rights statute successfully invoked in *Rachel*. Therefore, removal based on Section 245(b) is appropriate.

I. Georgia v. Rachel, 384 U.S. 780 (1966), Allows Removal Under Any Federal Law Providing For Specific Civil Rights Stated In Terms Of Racial Equality Which Forbids Harassing Prosecutions.

In the companion cases of *Georgia* v. *Rachel*, 384 U.S. 780 (1966) [hereafter *Rachel*], and *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966) [hereafter *Peacock*], this

Court established the meaning and scope of civil rights removal under 28 U.S.C. § 1443(1). In an exhaustive analysis of the history of civil rights removal legislation and litigation, this Court established the principles which control the decision on removal in this case. To succeed here, defendants petitioning for removal of their state criminal prosecutions to federal court need only show that:

1. The right upon which they rely is a "right under any law providing for . . . equal civil rights," 28 U.S.C. § 1443(1), "stated in terms of racial equality." *Rachel*, 384 U.S. at 792; see also *Peacock*, 384 U.S. at 825; and

2. "Mere pendency of [state court criminal] prosecution enables the federal court to make the clear prediction that the defendants will be 'denied or cannot enforce in the courts of [the] State' [28 U.S.C. § 1443(1)]" the protected right. *Rachel*, 384 U.S. at 805; *Peacock*, 384 U.S. at 826-828.[11]

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11 In *Rachel*, as in this case (see Argument III, *infra*), such a "prediction" is a *certainty* because the rights protected by statute include the right to be free from *any* state court prosecution:

> "In these circumstances . . . the burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the [statute.]" (384 U.S. at 805)

Therefore, in this case this Court need not determine in what *other* situations "it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.'" *Peacock*, 384 U.S. at 828.

In *Rachel* civil rights demonstrators were arrested for criminal trespass[12] allegedly for seeking nondiscriminatory service at restaurants prohibited from racial discrimination by Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, and their removal petitions were sustained by a unanimous Court. First, Title II of the Act, by "conferring a specific right of racial equality," qualified as a "law providing for . . . equal civil rights" within the meaning of § 1443(1). 384 U.S. at 793-94. Second, because § 203(c) of that Act prohibited any "attempt to punish" persons for exercising Title II rights, petitioners were immunized against state prosecutions for protected conduct —

> "*any* proceedings in the courts of the State will constitute a denial of the rights conferred by the Civil Rights Act of 1964 * * * It is no answer in these circumstances that the defendants might eventually prevail in the state court [footnote omitted]. The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964 * * *." 384 U.S. at 804-05.

No showing was required either (a) that the Georgia criminal trespass statute was unconstitutional or in conflict with the Federal Act on its face (384 U.S. at 805), or (b) that the Georgia courts would not recognize petitioners' Federal claims that the statute was invalid as applied (id.). By forbiding any "attempt to punish" persons for

12 "It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or other such person in charge. * * *" Ga. Code Ann. § 26-3005 (Supp. 1965).

protected activity (384 U.S. at 793), § 203(c) of the Act "prohibits prosecution" (id.), and therefore provides persons a right "not even to be brought to trial on these charges in the [state] . . . courts" (id. at 794).

By contrast, in *Peacock* removal of assorted prosecutions allegedly for picketing and demonstrating in support of voter registration activity was denied. First, the constitutional provisions invoked by petitioners, including the First Amendment, "clearly cannot qualify under the statutory definition as rights under laws providing for 'equal civil rights' " (384 U.S. at 825) stated in terms of racial equality. Second, although petitioners did invoke two equal civil rights laws — 42 U.S.C. §§ 1971 and 1981 — their protest activity in support of voter registration (as opposed to voting itself) did not come within the protection of either statute,[13] and their conduct was not protected by a Federal equal rights statute which "confers immunity from state prosecution on such charges" (384 U.S. at 827).[14]

13 42 U.S.C. § 1971(b) only protected from official interference the right of persons "to vote or to vote as he may choose" (*Peacock*, 384 U.S. at 811, n. 3), and did not cover voter registration activity. Subsequent to the removals in *Peacock*, Congress enacted § 11(b) of the Voting Rights Act of 1965, 42 U.S.C. § 1973i(b), which specifically prohibits official interference with "urging or aiding any person to vote or attempt to vote." "Vote" is defined specifically to include voter registration activity, 42 U.S.C. § 1973*l*(c)(1). Removal of spurious and pretextual state prosecutions to intimidate persons engaged in protected voter registration activity subsequently has been sustained. *Whatley* v. *City of Vidalia*, 399 F.2d 521 (5th Cir. 1968).

14 The constitutional provisions invoked by petitioners in *Peacock* were held to provide an ultimate defense against *conviction* for Federally protected activity, but none of them specifically applicable to petitioners granted an express Federal statutory right to be free of *arrest and prosecution* for their conduct. *Peacock*, 384 U.S. at 827-31. The Court held that removal cannot be predicated upon a right not to be convicted; rights which ordinarily are asserted as defenses in a state court prosecution and which, if not honored in state court, can be vindicated by appeal to the Supreme Court or by Federal habeas corpus (384 U.S. at 829).

Thus, under *Rachel* and *Peacock* removal turns upon whether the Federal law invoked by petitioners provides for the right not to be prosecuted because of protected activity *(Rachel)* or merely provides an ultimate defense against conviction for that activity *(Peacock)*. Civil rights removal is not restricted exclusively to trespass prosecutions for the exercise of rights protected by Title II of the Civil Rights Act of 1964. Cf. *Walker* v. *Georgia*, 417 F.2d 1, 5 (5th Cir. 1969) (Tuttle, J.). Removal is justified under "any law" (§ 1443(1)) — which includes "both existing and future statutes" (*Rachel*, 384 U.S. at 790) — which provides for "specific civil rights stated in terms of racial equality" (*Rachel*, 384 U.S. at 792) when those rights "will inevitably be denied by the very act of bringing the defendant to trial in the state court" (*Peacock*, 384 U.S. at 828).[15]

In 1968 Congress enacted Title I of the Civil Rights Act of 1968, codified as 18 U.S.C. § 245. Section 245(b)(5) protects against official interference persons "participating lawfully in speech or peaceful assembly opposing any denial of the opportunity" to enjoy the listed benefits and activities *free from racial discrimination*. In the following Argument we will show that the requirements for civil rights removal pursuant to 28 U.S.C. §1443(1) set out in *Rachel* and *Peacock* are squarely met, and that this case is not rationally distinguishable from *Rachel*. First, as the Court of Appeals recognized, § 245(b) "clearly deals with equal civil rights" (488 F.2d at 286) stated in terms of racial equality. Second, as the Court of

15 The generic phrase of § 1443(1) remains "open-ended," *Rachel*, 384 U.S. at 789; "A precise definition of the limitations of the phrase 'any law providing for . . . equal civil rights' in § 1443(1) is not a matter we need pursue to a conclusion * * *" *Peacock*, 384 U.S. at 825.

Appeals also noted, § 245(b) "forbids certain forms of harassment such as the bringing of spurious criminal charges" (id. at 287). By forbidding "attempts to . . . intimidate or interfere with" protected activity, § 245(b) in language functionally identical to that relied upon in *Rachel provides for a right* not to be arrested or prosecuted for activity protected by the statute, including the petitioners' civil rights protest activity. Thus, petitioners are "denied or cannot enforce" within the meaning of § 1443(1) their § 245(b) right to be free of state interference "by the very act of bringing [them] to trial in the state court."

II. Section 245(b) Is A "Law Providing For . . . Equal Civil Rights" Within The Meaning Of The Civil Rights Removal Statute.

18 U.S.C. § 245(b), by its language and purpose, clearly qualifies under the *Rachel* definition of a "law providing for . . . equal civil rights" as a Federal law "providing for specific civil rights stated in terms of racial equality" (384 U.S. at 792). First, as the Fifth Circuit correctly noted, § 245(b) "clearly deals with equal civil rights" (488 F.2d at 286). The statute prohibits any person, whether or not acting under color of law, from interfering with any other person "because of his race [or] color" and because of his participation in the benefits and activities listed in subparagraphs (2) (A) through (F) in a racially nondiscriminatory fashion. In subparagraph (5), the statute also prohibits interference with

> "any citizen because he is or has been, or in order to intimidate such citizen or any other citizen

> from lawfully aiding or encouraging other persons to participate, *without discrimination on account of race* [or] *color* . . . in any of the benefits or activities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate —" (Emphasis added.)

The purpose of the statute is to prohibit and deter racially-motivated interference with the enjoyment of the specified benefits and activities, and further to protect against racially-motivated interference those who engage in speech and peaceful assembly opposing any denial of the opportunity to so participate. S. Rep. No. 721, 90th Cong., 1st Sess., pp. 3-6 (1967); H.R. Rep. No. 473, 90th Cong., 1st Sess., pp. 3-7 (1967).

This statute is almost identical to Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq., successfully invoked in *Rachel*, because it — like Title II — prohibits interference with persons exercising their right of equal access to places of public accommodations. See § 245(b)(2)(F). The statute protects the exercise of rights secured by pre-existing Federal civil rights legislation, e.g., the Civil Rights Act of 1964 and the Voting Rights Act of 1965; but it also creates new equal civil rights by going beyond the coverage of Titles II (public accommodations) and VII (employment) of the Civil Rights Act of 1964, see S. Rep. 721, 90th Cong., 1st Sess., pp. 6-7 (1967); H.R. Rep. No. 473, 90th Cong., 1st Sess., p. 5 (1967). For the first time, the statute protects persons not only "participating" in the exercise of equal civil rights, but also protects persons "affording another person or class

of persons opportunity or protection to so participate" (§ 245(b)(4)(B)); persons "encouraging other persons to participate"; and persons "participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate" (§ 245(b)(5)).

Second, the above-quoted language and the legislative history of the statute clearly reveal that by enacting this statute Congress intended to impose on state officials and private persons a duty not to interfere with peaceful civil rights protest activities opposing discriminatory denial of the listed benefits and activities, and to provide a correlative right on the part of civil rights demonstrators to be free of such interference. The President and Congress were concerned that existing legislation — particularly 18 U.S.C. §§ 241 and 242 — was inadequate because it failed to specify in clear and precise terms what conduct was prohibited, because of problems of proof encountered in enforcing existing statutes (conspiracy, specific intent), and because it appeared that state and local authorities were slow, unwilling, or unable to act effectively to remedy forcible interference with peaceful civil rights activity. 114 Cong. Rec. 820 (1968) (civil rights message of President Lyndon B. Johnson); S. Rep. 721, 90th Cong. 1st Sess., pp. 4-6 (1967); H.R. Rep. No. 473, 90th Cong., 1st Sess., pp. 3-7 (1967). The Congressional purpose of the new legislation was to provide additional and specific protections against racially-motivated interference with civil rights, particularly to civil rights demonstrators opposing racial discrimination:

> "The bill would *protect* persons who urge or aid participation in the protected activities, as well as those who engage in speech or peaceful

assembly opposing denial of the opportunity to so participate." S. Rep. No. 721, 90th Cong., 1st Sess., p. 4 (1967) (emphasis added). See also, H.R. Rep. 473, 90th Cong., 1st Sess., p. 3 (1967).

Finally, the legislative history makes clear that the statute was designed to *provide* a *right* to be free of proscribed interference "by deterring and punishing forcible interference with the exercise of Federal *rights*." (S. Rep. 721, 90th Cong., 1st Sess., p. 6 (1967) (emphasis added)):

"The bill before us would *provide* Federal *protection*, wherever needed, when specific *rights* are violated. This bill clearly spells out exactly what those *rights* are." 114 Cong. Rec. 669 (1968) (remarks of Senator Scott) (emphasis added).

"In essence it protects the *rights* granted by the Civil Rights Act of 1964 and 1965 and, more fundamentally, by the Constitution itself. Those *rights* must not be frustrated. They *must not* be made the prey of violence or intimidation." 114 Cong. Rec. 3806 (1968) (remarks of Senator Mansfield) (emphasis added).

"This bill *will protect* men of all races *who seek to exercise and to afford others the federal rights* which Congress has affirmed during the past decade — men who would follow the road of dignity and peace on which Dr. Martin Luther King marched." 114 Cong. Rec. 9570 (1968) (remarks of Rep. Rosenthal) (emphasis added).

> "The bill *also protects* the *right* of every citizen to enjoy and partake of public expression in free speech . . ." 113 Cong. Rec. 22671 (1967) (remarks of Rep. Madden) (emphasis added).
>
> "We must *guarantee* each individual and group their constitutional *rights* of freedom of speech and assembly. Due protection of law must be afforded every individual or group to peacefully assembly, to speak and to protest." 113 Cong. Rec. 22772 (1967) (remarks of Rep. Esch) (emphasis added).

The Court of Appeals, therefore, erred when it held that removal was precluded because "§ 245 is exclusively a criminal statute" and "confers no rights whatsoever" (488 F.2d at 287). The Court below cites no authority for its unique view that rights are "provided" only by statutes imposing civil sanctions and not by statutes providing criminal sanctions. Certainly there is no support in *Rachel* or *Peacock* for such a distinction:

> "That these federally protected rights are set forth in terms of prohibition against their interference, and that criminal sanctions are imposed for their violation, does not take them out of the *Rachel* rationale since they are nevertheless contained in a "law providing for specific civil rights stated in terms of racial equality." There is nothing in the Supreme Court's opinion in *Rachel* to indicate any limitation or restriction on removal because the law is accompanied by criminal penalties rather than

civil remedies." *Perkins* v. *Mississippi*, 470 F.2d 1371, 1373 (5th Cir. 1972) (en banc) (Ainsworth, J., dissenting).

Such a holding is contrary to the express language of § 245(b) and the clear intent of Congress.

Nor does the court below cite any other authority — statutory, natural law, or divine — for its view that criminal statutes cannot "provide" rights within the meaning of the removal statute. In contrast, in several significant instances, this Court has allowed civil rights removal to protect rights secured by statutes which provided criminal penalties for their violation. Yet, the Court of Appeals rejected removal to protect § 245 rights for the reason that there was no comparison between § 245 and the "model" of the Civil Rights Act of 1866 cited by this Court in *Georgia* v. *Rachel, supra* (488 F.2d at 287). In so doing the Fifth Circuit completely overlooked the fact that Section 2 of the 1866 Act provided criminal penalties for its violation. Civil Rights Act of April 9, 1966, ch. 31, § 2, 14 Stat. 27.[16] Further, this Court indicated in the earliest removal cases that rights provided by an ex-

16 The Civil Rights Act of April 9, 1966, of which present § 1443 is a "direct descendant" (*Rachel*, 384 U.S. at 786), in Section 1 (now included in 42 U.S.C. § 1981) secured for all citizens "of every race and color" the same rights as are "enjoyed by white citizens," including the right "to full and equal benefit of all laws and proceedings for the security of persons and property" and "shall be subject to like punishment, pains, penalties, and to none other." 14 Stat. 27. Section 2 provided maximum criminal penalties of $1,000 or one year imprisonment, or both, for any deprivation under color of law of the rights secured by the Act. Id. Section 3, the removal section, provided for removal to Federal court by "persons who are denied or cannot enforce . . . the rights secured to them by the first section of this act . . ." Id. In *Rachel* this Court held that in enacting present § 1443, Congress intended to include any law "comparable in nature to the Civil Rights Act of 1866" (384 U.S. at 790) and that "the model for the phrase 'any law providing for . . . equal civil rights' . . . was the Civil Rights Act of 1866" (id. at 791).

clusively criminal statute punishing racial discrimination in jury selection, Act of March 1, 1875, ch. 114, § 4, 18 Stat. (Pt. 3) 336, now codified as 18 U.S.C. § 243 (and therefore, at least in the United States Code, a companion statute to the one invoked here), if denied by conflicting state law could be protected by § 1443 removal of criminal prosecutions. *Gibson* v. *Mississippi*, 162 U.S. 565, 580 (1896); *Neal* v. *Delaware*, 103 U.S. 370, 385-86 (1881); *Virginia* v. *Rives*, 100 U.S. 313, 321 (1880). See Note, *Federal Jurisdiction: The Civil Rights Removal Statute Revisited*, 1967 Duke L.J. 136, 154, n. 90.

None of the civil rights statutes for which removal has been allowed expressly stipulate removal as a remedy. The language of the removal statute is generic, and removal is to be allowed to protect rights secured by *any* Federal statute "providing for . . . equal civil rights." Clearly Section 245 is, therefore, comparable in every respect to other statutes — criminal and civil — which this Court has previously held "*provide*" equal civil rights:

> "In both its purpose (preventing unwarranted interference with the exercise of Federally protected equal civil rights) and the scope of its prohibition (against attempted injury, intimidation or interference by force or threat of force) § 245(b) is indistinguishable from the relevant provisions of the 1964 Civil Rights Act held sufficient to support removal jurisdiction in *Rachel*." *Perkins* v. *Mississippi*, 455 F.2d 7, 42-43 (5th Cir. 1972) (Brown, C.J., dissenting).

The Court below erred when it excluded "exclusively criminal" statutes from the coverage of 28 U.S.C. § 1443(1) as a matter of law.

III. Petitioners By These Arrests And Prosecutions Are "Denied [And] Cannot Enforce" In State Court Their Rights Secured By 18 U.S.C. Section 245(b).

A. By Prohibiting Official Interference with Civil Rights Protest Activity, Section 245(b) Provides for a Right Not to be Arrested or Prosecuted for Protected Activity.

18 U.S.C. § 245(b) by its express terms secures to petitioners more than the right eventually to prevail in state court; it specifically by its terms protects persons exercising rights under that statute from anyone who

> "whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with —

the exercise of secured rights. The broad language chosen by Congress, "by force or threat of force," covers any threatening conduct designed to interfere with protected rights or to punish victims for their exercise of protected rights. The phrase "whether or not acting under color of law" specifically includes law enforcement and judicial officers. The Committee reports indicate that the bill

"would prohibit forcible interference . . . by public officers," S. Rep. 721, 90th Cong., 1st Sess., p. 6 (1967); H.R. Rep. 473, 90th Cong., 1st Sess., p. 3 (1967). Thus, the broad prohibitions of the statute precisely cover the forcible arrests of the petitioners here and attempts to punish them for their peaceful exercise of protected civil rights protest activity:

> "Obviously, then, the bill directs itself to inhibiting, to constraining, to controlling, to prohibiting, the willful exercise of improper authority or unlawful authority or excessive authority on the part of local law enforcement officials, many of whom are charged with carrying out and protecting the very provisions of this bill." 113 Cong. Rec. 22758 (1967) (remarks of Rep. Wright).[17]

The Court of Appeals conceded in its opinion that this prohibition against even attempted injury, intimidation or interference by force or threat of force was sufficiently broad to forbid "certain forms of harassment such as the bringing of spurious criminal charges" (488 F.2d at 287). Like the statute invoked in *Rachel*, the equal civil rights statute invoked here both (1) protects petitioners' Federal right to engage in conduct, for example, picketing and persuading shoppers not to patronize discriminatory merchants, and (2) provides the further statutory Federal right that state officials should not even attempt to arrest or prosecute petitioners, or otherwise forcibly intimidate or interfere with them, because of their protected conduct.

17 "The bill . . . prohibits public interference of any of the specified activities by individuals acting alone, as well as by police officers acting under color of law." 113 Cong. Rec. 22671 (1967) (remarks of Rep. Madden).

The vague and overbroad provisions of Miss. Code Ann. § 97-1-1(f) (1972) under which the demonstrators were arrested, which generally punish a conspiracy "to commit any act injurious . . . to public morals, trade or commerce," were interpreted by the arresting officer to proscribe this Federally protected activity. This created a conflict between the explicit protections of the Federal equal rights statute and state law. Thus, § 245(b), like the 1964 Civil Rights Act invoked in *Georgia* v. *Rachel, supra,* substitutes a Federal right for a state crime, cf. *Rachel,* 384 U.S. at 805-05; *Hamm* v. *City of Rock Hill,* 379 U.S. 306, 314 (1964), and immunizes petitioners' conduct not only from conviction, but also from prosecution in state court.

Although the statute in *Rachel* specifically provided that "No person shall . . . punish or attempt to punish" any person for exercising rights under that statute (§ 2000a-2(c)), § 245(b) by prohibiting official or private acts or attempts to "injure, intimidate, or interfere" with civil rights protest rights employs a more general prohibition against any attempted injury, intimidation, or interference. This more general prohibition includes the forcible arrests, incarceration and state prosecution in this case, by any person "whether or not acting under color of law." Literal comparison of the two provisions therefore suggests that § 245(b) is a more, not less sweeping prohibition of official acts of harassment against equal civil rights than the limited proscription of § 2000a-2(c). "Attempts to punish" are only one of many means of injuring, intimidating, or interfering. As noted by Chief Judge John R. Brown of the Fifth Circuit:

> "Compare the language of § 245(b) with 42 U.S.C.A. § 2000a-2(c), the statute utilized as a vehicle for removal in *Rachel.* Since 'injury, intimidation or interference' by 'force or threat of force' is at least the linguistic equivalent of 'punish,' § 245(b) must likewise provide an identical basis for removal, since 'on its face, this language prohibits prosecution' for the exercise or attempted exercise of equal civil rights. Hamm v. City of Rock Hill, 1964, 379 U.S. 306, 311, 85 S.Ct. 384, 389, 13 L.Ed.2d 300, 304." *Perkins* v. *Mississippi,* 455 F.2d at 39, n. 71 (dissent).

See, Comment, *Removal of State Criminal Prosecutions to Federal Court Under 42 U.S.C. § 1443,* 64 J. Crim. Law 76, 86 (1973). Cf. *Whatley* v. *City of Vidalia,* 399 F.2d 521, 525-26 (5th Cir. 1968); *North Carolina* v. *Hawkins,* 365 F.2d 559, 562 (4th Cir. 1966) (Sobeloff, J., concurring), cert. denied, 385 U.S. 949 (1966) (42 U.S.C. §§ 1971(a) and 1973i(b)).[18]

As 18 U.S.C. § 245(b) forbids "attempts to injure, intimidate or interfere with" protected activity, the statute invoked here *provides for* a Federal statutory right not

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18 In considering similar language found in § 11(b) of the Voting Rights Act of 1965, 42 U.S.C. § 1973i(b), which prohibits any "attempt to intimidate, threaten, or coerce" any person exercising protected voting rights, commentators have suggested that "no satisfactory distinction for removal purposes can be drawn between a denial predicated upon the 'intimidate' phraseology of that section and the 'attempt to punish' language of the 1964 Civil Rights Act." Note, *Federal Jurisdiction: The Civil Rights Removal Statute Revisited,* 1967 Duke L.J. 136, 185; cf. Comment, *Civil Rights Removal Under 28 U.S.C. § 1443 (1): One Hundred Years of Inutility,* 21 Am. U. L. Rev. 375, 393-94 (1972). This view has been adopted by the Fifth Circuit, *Whatley* v. *City of Vidalia,* supra; *Thompson* v. *Brown,* 434 F.2d 1092 (5th Cir. 1970); also, *Mashburn* v. *Daniel,* Civil No. 73J-138(R) (S.D. Miss. Aug. 20, 1973).

even to be prosecuted in the Mississippi courts. The provisions of the Federal equal rights statute invoked by petitioners here therefore make *Rachel* controlling, and *Peacock* distinguishable, since the absence of any such language was critical to the denial of removal in *Peacock* (483 U.S. at 827, n. 25). Because § 245(b) prohibits attempts to intimidate and interfere with protected rights, under *Rachel* "*any* proceedings in the courts of the State will constitute a denial of the rights" (384 U.S. at 804, emphasis in original) conferred by the act:

> "the mere pendency of the prosecutions enables the federal court to make the clear prediction that the defendants will be 'denied or cannot enforce in the courts of [the] state' the right to be free" (*Rachel*, 384 U.S. at 805)

of any "attempts to injure, intimidate or interfere with" any person "participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to . . . participate" in protected benefits and activities.

Compelled by *Rachel*, this holding limits the applicability of removal to the narrow class of cases of baseless arrests and prosecutions for *racial* protest demonstrations opposing the denial of *equal* enjoyment of those benefits and activities *specified* in the statute, and would not disrupt the bulk of legitimate state criminal litigation. This limited preemptive Federal protection is *necessary* and *justified* both because of the special prominance of the rights asserted and because of their extreme vulnerability in the face of mass arrests and prosecutions. This limited right of removal is *required* because Congress so provided in enacting Section 245(b) and 28 U.S.C. § 1443(1).

B. Removal is Necessary to Protect Section 245(b) Rights of Civil Rights Protest From Denial by State Criminal Process.

The Federal substantive guarantees of equal civil rights, unlike the trial procedure rights protected in the *Strauder-Rives-Powers* line of removal cases,[19] are principally aimed at prohibiting the states from repression of certain kinds of protected conduct. As the legislative history of § 245(b) makes clear, its purpose was immediately to allow and to liberate from state and private inhibition and deterrence the conduct it was designed to protect. It certainly was not meant merely to restrict the forms through which state procedure may abut at judgment. Normally, Federal trial protection rights may adequately be recognized upon reversal of tainted convictions. But the very maintenance, the mere pendency, of state criminal proceedings directed at the abridgment of substantively protected conduct has a unique repressive force that precedes and is entirely independent of the final judgment. *Rachel,* 384 U.S. at 805.[20]

Congress in enacting the Civil Rights Act of 1968 clearly was aware of the repressive force of mass arrests and detention of civil rights demonstrators upon the exercise of the substantive right to protest racial discrimination. Subparagraph (5) of § 245(b) not only protects against interference with persons protesting racial discrimination,

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19 *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Virginia* v. *Rives*, 100 U.S. 313 (1880); *Kentucky* v. *Powers*, 201 U.S. 1 (1906). See *Rachel*, 384 U.S. at 797-804.

20 See also, A. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 861 ff. (1965).

but also protects against interference "in order to intimidate such citizen *or any other citizen*" (emphasis added) from lawfully protesting racial abridgment of the listed benefits and activities. Thus the statute, by its express terms, prohibits interference designed to have a "chilling effect" on the free exercise by persons other than the immediate victims of the right of racial protest, thus requiring anticipatory Federal relief.

Indeed, abrogation of the right to protest racial discrimination by arrest and incarceration of the demonstrators goes beyond the denial of protest rights: by cutting off those opposing racial discrimination, the state officials make possible a perpetuation of the invidious and humiliating discrimination which was the object of the protest activity. The victims of the arrests thus are multiplied: the demonstrators, their rights of racial protest, and the equal opportunities which they seek not only for themselves, but for all others similarly situated. In passing Section 245(b) Congress intended otherwise.

If by the arrests and prosecutions, others are deterred from exercising the substantive rights granted by the statute — as here — then these rights are initially denied by the first stage of the state criminal proceeding. Meaningful correction by an appellate court is therefore virtually impossible. It defeats the purposes of the Section 245(b) and the removal statute to conceive the Federal statutory right to conduct and participate in a racial protest demonstration merely as a right to a favorable judgment at the conclusion of the state prosecution — or appeal from a conviction — for demonstrating. This does not protect petitioners and persons associated with them from the harassment and intimidation by the local law

enforcement agencies which is proscribed by the statute. It does not protect them from arrest *en masse* on frivolous or unfounded charges. It does not protect them from continued arrest and incarceration until bond can be made for their release. It does not protect them from the long delays attendant upon trial, whether individually or collectively. It does not protect them from often expensive litigation or appeals until their rights are finally vindicated. It does not protect them or "any other citizen" from being frightened away from the lawful assertion of their rights and lawful protest against the continued denial of them. Cf. *NAACP* v. *Thompson*, 357 F.2d 831, 838 (5th Cir. 1966), cert. denied, 385 U.S. 820 (1967).

These considerations were evident in *Rachel* when the Court held:

> "It is no answer in these circumstances that the defendants might eventually prevail in the state court [footnote omitted]. The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964. * * *" (384 U.S. at 805).

But regardless of these other considerations affecting removal under § 245(b), the same result obtained in *Rachel* is required here because Congress in § 245(b) has expressly provided a right not to be arrested and prosecuted for protected activity. Under *Rachel* this right not to be prosecuted is controlling for removal. Any Federal equal civil rights statute which confers such a right not to be prosecuted thereby provides for — and is a "law providing for" — the relevant right which supports

removability. Because of its proscriptions against official harassment and intimidation, § 245(b) must be held to be such a law, unless *Rachel* is to be overruled.

This protection of the right not even to be prosecuted in state court, enforced by the Court in *Rachel* and compelled here, scrupulously avoids turning removal upon any notion that disparages the state judiciary or implies that they will not act to protect preemptive Federal rights. Petitioners here are *not* contending that removal is required simply because the charges against them are false, or that they are unable to obtain a fair trial in state court (cf. *Peacock*, 384 U.S. at 827). Neither does the interpretation urged by petitioners require or permit "the judges of the federal courts to put their brethern of the state judiciary on trial" (*Peacock*, 384 U.S. at 828), since it is clear that by operation of § 245(b) petitioners' Federal rights "will inevitably be denied by the very act of bringing [them] to trial in the state court" (id.). Indeed, because removal occurs prior to the state court judgment, this removal procedure puts *less* strain on relations with the state judiciary than post-judgment review, such as by appeal to this Court or by Federal habeas corpus, which does require Federal judges to sit in judgment of their state brethern in reversing or modifying a state court judgment.

Since the whole theory of removal under *Rachel* and *Peacock* depends upon whether an individual has a right "not even to be brought to trial on . . . charges," the test of "providing for" is whether the Federal civil rights law invoked *provides for* a right not to be prosecuted. If it does, then *any* proceedings in the courts of the state will constitute a denial of the right conferred, and the mere

pendency of the prosecutions enables the Federal court to predict under § 1443(1) that the defendants will be "denied or cannot enforce" their right in state court. This is precisely what § 245(b) does provide.

IV. The Judgment Below Should Be Reversed And The Case Remanded To The Court Of Appeals.

As set forth in Arguments II and III, removal of state criminal prosecutions based on Section 245(b) is appropriate, contrary to the conclusion of the court below. Therefore, upon a petition alleging factual circumstances covered by Section 245(b), an evidentiary hearing is required in Federal District Court to determine, as a matter of fact, whether the conduct which is the subject of the state criminal prosecution is protected under Section 245(b). *Rachel*, 384 U.S. at 805-06. If so, the state criminal prosecution must be dismissed; if not, the case must be remanded to the state court for trial. Id. As stated by Judge Tuttle for the Fifth Circuit in another case, this factual determination turns on

> "what the movant was *actually* doing with respect to the exercise of his statutory federally protected right, as determined in a hearing for remand, . . . and not the characterization given to the conduct in question by a state prosecutor." *Walker* v. *Georgia*, 417 F.2d 1, 5 (5th Cir. 1969) (emphasis in original).

As set forth in the Statement of the Case, Facts, *supra*, what petitioners were *actually* doing here was exercising

their Section 245(b) rights by attempting to participate (§ 245(b)(4)), encouraging others to participate (§ 245(b)(5)), and through lawful speech and peaceful assembly opposing discriminatory denials of the opportunity to participate (id.) in the specified benefits and activities of the statute free of racial discrimination. The goals of petitioners' protest activities fit precisely within the protections of Section 245(b):

> "To find ways to get more jobs for black people [§ 245(b)(2)(C)], to try to get black people on Civil Service [id.], jobs on the board of education [id.], to see what could be done for needy families that should be on Welfare or Social Security [§ 245(b)(1)(B) and (E), and (2)(B)], housing [id.], the whole public service that should be rendered by the city [§ 245(b)(2)(B)].
>
> * * *
>
> We were just coordinating the activities that the people of Concerned Citizens of Vicksburg were concerned about. As I said, they wanted to know about welfare, they wanted to know about Social Security. They thought that a lot of people who were eligible weren't receiving it. They wanted to know about housing, and they felt that a lot of people needed that. So our main involvement was to find ways of channels or avenues that more people could get these jobs, they could get better housing, to try and get more people on welfare, those who were eligible." App. 49-50 (Ferguson testimony).

"The things that the black people of Vicksburg are asking for are in conjunction, basically in conjunction with both the city officials and the merchants; the activities of the merchants in not allowing more black people to work other than janitorial positions are uncalled for because there are sales people and managerial type people in Vicksburg who are qualified and able to do a good job [§ 245(b)(2)(C)]. Basically, I think it's good business for businessmen to hire black people. In conjunction with the city, there are very few, two or three [Blacks] at the most, employed with the city; and yet black people in Vicksburg compiles more than 46 percent of the population, and there are no black people other than janitors working in City Hall. I understand recently they might have had a clerk that has recently been hired, but there are no black people in the Civil Service force, there aren't any black people on the housing authority boards, at least there aren't any in decision making jobs [§ 245(b)(2)(C)]." App. 67 (Ferguson testimony).

In the face of the overwhelming evidence that petitioners' activities and goals came directly within the protections of § 245(b), and that their protest activities were peaceful, the District Court held that petitioners' activities were not protected (Petition, App. D, p. 19a). Insofar as this holding is based on findings of fact adverse to petitioners,[21] we submit that they are plainly in error.

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21 Some of the findings of the District Court, however, clearly are tainted by its erroneous view of the law. First, the District Court goes beyond merely accepting the state prosecutor's characterization of petitioners' conduct (App. 30) by suggesting, *sua sponte*, that the petitioners' conduct fell under state criminal statutes different than the one charged by the state prosecutor (Pet., App. D, pp. 17a-18a, 20a).

On appeal to the Fifth Circuit, petitioners contended that the District Court's adverse findings of fact were "clearly erroneous." Rule 52(a), F.R. Civ. P. Although the Court of Appeals in its opinion may have concluded that petitioners' conduct was wholly within the protections of Section 245(b) — "At the outset, we note that there is no question of appellants' right to engage in peaceful picketing" (488 F.2d at 286) — the court below did not review the factual issue. The appeals court instead limited its decision to the legal conclusion that Section 245(b) as a criminal statute could *never* support removal. 488 F.2d at 287. In such circumstances, given that fundamental rights are at stake, this Court may "make an independent examination of the whole record" to determine whether petitioners' activities were within Section 245(b), *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963); *Cox* v. *Louisiana*, 379 U.S. 536, 545 (1965); or it may remand this case to the Court of Appeals to review the factual issue free of legal error, cf. *United States* v. *Brims*, 272 U.S. 549, 553 (1926); *Cole* v. *Ralph*, 252 U.S. 286, 289-90 (1920).[22] Petitioners are confident that such review by this Court, or by the Court of Appeals, will show that petitioners' conduct is protected activity under Section 245(b), and therefore that the remand order of the District Court should be vacated and the state court charges dismissed.

Footnote 21 (Con't)

Second, the more narrowly the District Court erroneously construed the rights protected under § 245(b), the greater the permissible area of potential criminal conduct. Thus, it is understandable, but not legally justifiable, how the District Court could proceed on the *theory* that protected civil rights protest demonstrations against official discrimination and boycott activity designed to gain equal employment opportunities could somehow constitute a "restraint of trade."

22 This independent review of the facts is particularly appropriate here where the Court of Appeals has *not* reviewed the facts. Therefore, the usual "two court" rule — *Keyes* v. *School District No. 1*, 413 U.S. 189, 198, n. 9 (1973) — is *not* binding on this Court.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the Judgment of the Court of Appeals should be reversed and the case remanded to the Fifth Circuit either for review of the factual contentions of the parties or to vacate the remand order and dismiss the state criminal charges.

Respectfully submitted,

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